

December 30. 1767.

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A N S W E R S

F O R

JAMES CHALMERS merchant in Leith,



T O

The PETITION of James Muirhead writer in
Edinburgh,

THE question in dispute is, with submission, liable to no ambiguity; the interlocutor reclaimed against is founded upon clear principles of law; so that a very few words would be sufficient to satisfy the court, that the merits of the question is in favour of the respondent: but as the respondent has been put to a very great expence, by the unparalleled litigiousness of this petitioner, and which is now become an object of consideration in this cause; so, in order to give your Lordships a just view of his conduct, it will be proper for the respondent to give a full detail of the proceedings from the beginning; and from a bare recital of the facts, the respondent is humbly persuaded, that your Lordships will be of opinion, not only that the merits of the cause itself is for the respondent, but that he is intitled to a full indemnification for the damages and expences he has suffered in this case.

The petitioner having been proprietor of a tenement of land in the head of the Canongate, signified an intention to the respondent, who had been his tenant, to dispose thereof; and af-

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ter many communings, the bargain was at last concluded, in presence of two tradesmen of character, called of purpose by the parties, upon the 26th of August 1757, at the price of L. 190 Sterling.

As the respondent's ordinary doer had set out for England that day, and who it was intended should have been present to draw a proper minute of sale, the petitioner, who is himself a practitioner of the law, said he would draw a missive letter, which would equally bind both parties: and accordingly the following letter, holograph of the petitioner, was by him delivered to the respondent.

" Sir, I promise and oblige me, that Thomas Anderson
 " merchant in Leith shall dispoise to you a tenement of land in
 " the head of the Canongate, which formerly belonged to
 " me, possessed by James Inglis merchant in Canongate and
 " others, and that upon payment to him of L. 190 Sterling,
 " L. 100 to be paid at Martinmas first to come, and the L. 90
 " at Candlemas first to come; and that from and after Whit-
 " funday last past, which is to be your entry thereto, you ha-
 " ving paid L. 1 Sterling of earnest: and that the rights shall
 " be made out at the sight and pleasure of Mr Walter Ferguson
 " writer in Edinburgh, which I oblige me shall be done at or
 " before Martinmas first. I am, Sir, your most obedient hum-
 " ble servant, (signed) JAMES MUIRHEAD. *Canongate, 26th*
 " *August 1757. Addressed) To Mr James Chalmers merchant*
 " *in Leith.*"

The respondent, not suspecting that the implement of the bargain would be attended with the least difficulty, made sundry meliorations on the tenement, and at Martinmas offered the L. 100, being the first moiety. But the petitioner saying that he had only occasion at that time for no more than the half, the respondent paid him L. 50, for which he granted his bill as a voucher; and Mr Ferguson having returned from London upon the 29th of November, the above letter was put into his hands, with the progress, in order to make out the disposition: but in

two or three days thereafter the petitioner returned, and told, that Anderfon was dead, and that implement of the tranfaction behoved to stop for some time.

It is now above ten years since the bargain was made, and the respondent has been in constant communings, submissions, and law-processes to procure implement; yet the petitioner, by different shifts, and turning himself into so many different shapes peculiar to himself, as is believed without a precedent, has had the art, not only to delay granting a disposition in terms of his missive, but also to keep possession of a considerable part of the subject, and with the rents thereof to defend himself at law, against implementing his own obligation.

And more particularly, after amusing the respondent for above a year, that he had been employed in removing certain difficulties thrown in the way by the heirs of Anderfon, against implement of the bargain, as if the tenement sold had belonged to him, the petitioner threw off the mask, and executed a precept of warning in his own name as heritable proprietor, against William Hay, to whom the respondent had set the shop or lower story, to remove therefrom at Whitfunday 1759.

The respondent having challenged the petitioner for this strange step, the only answer he made was, that he wanted to get free of the bargain: and that as for the heirs of Anderfon, they had no title: for that although he had executed a disposition of the tenement to their father in the 1755; yet he had never delivered it, nor had any thing followed upon it; and, in order to confirm what he said, he took the disposition out of his pocket, and showed it to the respondent.

The petitioner thereafter brought an action of removing against William Hay, before the bailies of the Canongate; which having been opposed by the respondent, it was immediately dropped.

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The petitioner having thus openly avowed an intention not to fulfil his obligation, the respondent was advised to bring an action against him, before the sheriff of Edinburgh; libelling upon the foresaid obligatory missive; and concluding that the petitioner should be decerned to grant a disposition in implement thereof.

In this action it was pled, in defence, on behalf of the petitioner, That the tenement did not belong to him, but to Thomas Anderson; and that by his death the obligation became imprestable; and this, although the respondent had produced in process the execution of the foresaid warning, and also of three different discharges, which the petitioner, as proprietor of the subjects, had granted to the tenants for rents that had become due after the term of the respondent's entry. *2do*, That the letter contained no obligation upon the respondent; and that if the respondent was not bound, neither could the petitioner be bound. And, *lastly*, He contended, That there was still *locus penitentiae*.

These defences were most justly disregarded by the sheriff, who, of this date, pronounced the following interlocutor.
 May 2. 1759. "Repels the defences, and finds the defender liable to procure from the heirs of Anderson, and deliver to the pursuer a valid disposition of the tenement libelled, with proper and necessary clauses, and assignment to the rents, mails, and duties, for all time from and after Whitfunday 1757; or otherwise finds him liable in the pursuer's whole damages and expences."

The petitioner thereupon shifted his ground; and by a minute signed by himself, "referred to the pursuer's oath, that he agreed to pass from the bargain libelled."

The respondent accordingly deponed, "That he never did agree to pass from the bargain, nor did ever impower or give commission to any person to pass from the bargain for him."

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As the respondent considered the foresaid reference as a passing from his former defences, of its being a *factum im-
prestabile*; so he gave in to court a scroll of a disposition to the subject by the petitioner himself; which, after keeping a week, he returned without making any objection. In respect whereof, the sheriff, upon the 15th June 1759, ordained him to subscribe a disposition upon stamped paper, agreeable to said scroll.

The petitioner thereupon reclaimed against these interlocutors, and repeated again his former defence. To which the now respondent made answer in point of fact, *viz.* That Anderson was never proprietor of the subject, but that Mr Muirhead himself was the only proprietor at the date of the bargain, and continued so; for that the disposition thereof which he had executed in favour of Anderson, was admitted never to have been delivered to him: And the sheriff, upon advising the petition and answers, of this date adhered. July 18. 1759.

The petitioner thereupon applied by bill of advocacy; which, upon answers, was of this date refused by Lord Pres-July 28. 1759.
tongrange Ordinary. And he having thereupon reclaimed to your Lordships, you, of this date, upon advising petition,Aug. 9. 1759.
with answers, adhered to the Lord Ordinary's interlocutor.

The cause having returned to the sheriff, and a proper time having been allowed to the petitioner to obtemper the former judgement, by producing a disposition signed by him; protestation was admitted against him for not compliance; and the respondent was allowed to give in an account of expenses.

The petitioner thereafter preferred a reclaiming petition to the sheriff against the foresaid interlocutor of the 15th of June 1759, notwithstanding that a bill of advocacy, complaining thereof, had been refused, first by the Lord Ordinary, and afterwards by your Lordships. And this petition, with answers, having been advised, was refused by the sheriff of this date.

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Aug. 21.
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The petitioner preferred a second bill of advocation ; which came in course before Lord Edgefield Ordinary ; and upon answers, his Lordship refused the same of this date. And the cause being returned to the sheriff, the respondent insisted for his expences, conform to account given in some time before. And further time being allowed the petitioner to see and object, and the account being returned without objections, the

Nov. 9. 1759.

sheriff found him liable in L. 18 : 3 : 5 Sterling, the sum in the account, and in the expences of extracting the decreet.

The petitioner, who was ever fertile in ways and means to procure delays, did, upon the 15th of November, prefer a petition to your Lordships, reclaiming against Lord Edgefield's interlocutor of the 18th of October preceding ; upon which the court remitted to the sheriff to hear him on his objections against granting of the disposition.

In consequence thereof, the petitioner gave in objections, containing several facts concerning Anderson's purchase of the tenement, not only new and incredible, but inconsistent and contrary to what he had formerly admitted to be the fact. And after answers were put in thereto, he proposed a submission, which was agreed to upon the part of the respondent ; which was accordingly made out to Mess. Spence and Urquhart, writers to the signet. However, before signing, he refused, and professed himself ready to grant a disposition ; and, for that purpose, ordered a search of the records to be made himself, and in every respect, to outward appearance, was sensible of his former errors and mistakes.

But it appeared, that in this he was not serious ; that it was only done in the view to gain time, to execute a strange conceit he had taken up, of infecting his wife in the tenement on the 18th of February 1760, on a post-nuptial contract, said to have been passed between them the 10th of October 1750, in an yearly annuity of 500 merks ; and, in her name, to bring an action against the foresaid William Hay, the respondent's tenant in the lower story, or shop, before the

the bailies of the Canongate, for payment of the rents thereof, bygone and in time coming: but the respondent having caused compearance to be made in the action on behalf of his tenant, and a true state of the fact having been laid before the court, the petitioner and his wife thought proper to insist no further.

The respondent's doer having got the search of the records from Mr Ker, who had been employed by the petitioner himself, the petitioner refused to pay Mr Ker's account, amounting to L. 7, 11 s. Sterling; which obliged Mr Ker to bring an action against him before the sheriff; in which he defended himself, by denying that he had employed Mr Ker, and that he could not be bound unless Mr Ker could shew a written order under his hand.

The petitioner having thus failed in two attempts to possess himself of William Hay's rent for the lower story, made a third attempt no less extraordinary than the former.

This shop had been set in tack by Mr Walker, Muirhead's author, to Walter Neilson, which did not expire till Whitsunday 1759. Mr Neilson had given up this tack to the respondent, when he became purchaser; but the other double of the tack being in the petitioner's hands, he brought an action, as proprietor of the subject, and as assignee from Walker, his author, against Walter Neilson, for the rents of the same preceding Whitsunday 1759, being two years after the respondent's entry to the purchase; in which process the respondent was cast, and expences found due against him, tho' afterwards opened by a representation; and this process the respondent had also the trouble and expence of defending.

The petitioner having been so far defeated in these attempts, the next step which he thought proper to take was, to bring a reduction of his own holograph missive letter, upon these grounds: That it was null, as wanting the essential

tial solemnities required by law : And, *2do*, That it had long ago lost its force and effect. And this reduction having been remitted to the late Lord Justice-Clerk, he, upon advising
 July 12. 1760 a full minute of debate, of this date, repelled the reasons of reduction, and assilzied. And upon advising representation
 Jan. 8. 1761. and answers, his Lordship, of this date, adhered ; and there-
 Dec. 15. after, of this date, his Lordship refused a second representa-
 tion.

With respect to the process before the sheriff at the respondent's instance, for implement of the minute, which had stopped for some months, on account of the foresaid communings, and proposed submission ; the respondent in the mean time having got information that the tale of the tene-ment's being in the person of Anderson was without foundation, and that the petitioner was not possessed of any bill of Anderson's for the price, as he alledged, applied to the sheriff by petition, craving, That the now petitioner might be ordained to produce Anderson's bill for the price, which he had so often said he was possessed of ; and that he should appear in court, and answer such interrogatories as should be put to him relative thereto.

The now petitioner, in his answer, acknowledged he had not the said bill. Upon which the sheriff ordained him to compear in court next court-day, and answer such interrogatories as should be put to him. But he having failed to obtemper the interlocutor, protestation was admitted against
 July 9. 1760. him, and of this date the sheriff again found him liable to grant the respondent a valid disposition of the subjects libelled.

Against this interlocutor Muirhead preferred a petition, in which he set forth, That the respondent had agreed to pass from the bargain, although above a year before this very fact had ben referred to the respondent's oath, and he had deponed *negative*. And upon advising the same, with the
 July 25. 1760. answers, the sheriff ordained the petitioner to produce the
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bill said to be granted to him by Anderson for the price of the subjects libelled.

The petitioner thereupon presented his third bill of advocacy, which was passed on account of his foresaid process of reduction then depending in court: And this advocacy having been remitted to the reduction *ob contingentiam*, and the petitioner having given in a representation, craving judgement upon the merits of the advocacy, the same was appointed to be seen and answered, by interlocutor of this date.

July 13. 1762.

After this representation was laid before the respondent's counsel, to draw answers, the petitioner, on account of certain misdemeanors, was committed to prison, by order of your Lordships, and was discharged from acting as an agent: and however much reason the respondent had to be provoked with the usage he had received from the petitioner; yet the respondent, commiserating his unhappy situation, and unwilling to take any advantage of it, did stop any further proceedings until the petitioner should be again set at liberty.

The respondent had reason to expect, that so much lenity upon his part, would have brought the petitioner to a sense of his duty. Indeed, at first, he seemed to express a grateful sense of the treatment he had received from the respondent, and declared his readiness to end every thing amicably; and, after various shifts and delays upon his part, a submission was at length entered into: But although it depended above eighteen months, the petitioner could not be prevailed with to keep so much as one of the many appointments that had been made with the arbiter.

The submission having thus expired without any thing being done, the petitioner again renewed his applications in a most submissive manner; and although the respondent had been so often bubbled, yet upon his again agreeing by a missive, that the process should not sleep during these communications, did once more listen to his professions; but which at last ended in nothing, as formerly.

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While the petitioner was making these applications to the respondent and his doer, in order to have all matters amicably settled, he had wakened the process above mentioned, formerly carried on in his wife's name, before the bailies of the Canongate, and insisted in his own name against the respondent's tenant, William Hay, for the rents of the shop, from Whitsunday 1759, at L. 14 *per annum*; and obtained decret against Hay, then out of the kingdom, for the foresaid rent, although he knew that it was not only above the real rent, but that a great part of the rent pursued for had been already paid.

This obliged the respondent to protect his tenant; and for that end a process of multiple-poinning was raised, and a suspension obtained on double distress; and the respondent being now resolved to have no more communings with a man upon whom there could not be the least dependence in any one thing; so he caused intimation to be made to him, that he was to go on in the process: and the late Lord Justice-Clerk, upon advising the petitioner's representation already noticed, with the answers made thereto, of this date, Feb. 7. 1766. "found James Muirhead liable to grant to James Chalmers "a valid disposition to the subjects libelled, and decerned." March 4 1766. And afterwards, at a calling of this date, his Lordship allowed the decret formerly pronounced to be extracted.

Against the first interlocutor a representation was given in for the petitioner; in which he alledged, that the process was sleeping. But as this was only done to gain time, as he well knew that the allegation could be instantly disproved, by his own letter above mentioned; so a second representation was given in for him; in which he set forth, that the former representation was owing to a mistake of his agent; and although nothing new is set forth in this representation, to procure an alteration of the interlocutor; yet as it was presented among the last days of the session, it was appointed to be answered.

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The process was thereafter remit to the present Lord Justice-Clerk, in place of the former Ordinary; and the fore-said process of multiple-poin ding and suspension, which was brought at the instance of Hay the tenant, was remit to, and conjoined with the reduction and advocacion *ob contingen- tiam*; and his Lordship, upon advising the fore-said representa- tion, with answers, of this date, pronounced the following Feb. 3. 1767. interlocutor. " The Lord Ordinary having considered this " representation for James Muirhead, with the answers thereto " for James Chalmers, finds sufficient evidence, that since the " date of Muirhead's holograph missive to Chalmers libelled " on, Muirhead has, in various instances, continued to act as " proprietor of the tenement in question, and therefore re- " pells the defences founded on his pretended disposition of " the tenement to Anderson; adheres to the interlocutor of " the former Lord Ordinary, of the 7th of February and " 4th March last, and refuses the desire of the representa- " tion; and, further, prefers the respondent James Chalmers " to the bygone rents of the house and shop, part of the " said tenement, resting and owing by William Hay, raiser " of the multiple-poin ding, and decerns in the preference " and multiple-poin ding accordingly; and finds James " Muirhead liable to the said James Chalmers in the ex- " pence of process, and ordains an account thereof to be gi- " ven in."

Against this interlocutor the petitioner preferred a repre- sentation; in which, among other things, he insisted, That the respondent should be ordained to produce the title-deeds of the subject, and particularly the disposition that was granted in favour of the petitioner himself by his author Wal- ker, and the disposition granted by the petitioner to Anderson; and the Lord Ordinary, upon advising this representation, of this date pronounced the following Feb. 21. 1767. interlocutor. " Having " considered this representation; in regard the respondent, " after so much litigation before the former Lord Ordinary, " has,

“ has, in his sixth representation, declined stating his defence, or to point out the importance of the production which he now demands, refuses the desire of the representation, and adheres to his former interlocutor.”

March 11.
1767.

Against this interlocutor the petitioner represented; and the Lord Ordinary, upon advising the same, with answers, of this date pronounced the following interlocutor. “ Having considered this representation, and answers thereto, “ refuses the desire of the representation, and adheres to the “ former interlocutor; superseding extract till the third federunt-day of June next; and in the mean time appoints “ Walter Ferguson writer in Edinburgh, as factor, to uplift “ the rents of the tenement in question, which will fall due “ at Whitsunday next, upon his finding caution to account for “ the same, to the person who shall be found to have best “ right thereto, upon the issue of this cause.”

The petitioner thereupon preferred his *eighth representation*, in which he set forth, That David Loch had procured a disposition to the subject, on the 18th of May 1767, from James Anderson, the son of the foresaid Thomas Anderson; and that he had brought an action against the petitioner, before the sheriff of Edinburgh, for exhibition of the progress, and for payment of L. 500 Sterling, as the rents of the subjects, since Whitsunday 1755; and in this representation, he prays the Lord Ordinary to alter the former interlocutors, at least to supersede any procedure in this process, until that at the instance of Mr Loch, before the sheriff, is determined.

July 2. 1767. And the Lord Ordinary, upon advising thereof, of this date pronounced the following interlocutor. “ Having considered “ this eighth representation for James Muirhead defender, “ refuses the desire thereof, and adheres to the former interlocutor.”

The petitioner thereupon preferred his *ninth representation* to the Lord Ordinary; in which he expressly admitted, that Anderson had agreed that he should sell the subjects for his own payment; that the bargain with Anderson had accordingly

dingly been passed from; that Anderson had delivered up to the petitioner the disposition that had been granted in his favour; and that the petitioner, on the other hand, had delivered up to Anderson the bill which he had granted for the price: and in this representation he prayed the Lord Ordinary to find, that he was not bound to grant a disposition to the respondent; or at least to supersede further procedure until Loch was brought into the field, who claimed the subjects under the disposition to Anderson; and the Lord Ordinary, of this date, pronounced the following interlocutor. July 24 1767.

" Having considered this representation; in regard it is
 " therein admitted, that the sale by the defender to Anderson was redeemable; and that the second sale by the defender to Chalmers, the pursuer, was made with Anderson's consent; and that upon the second sale's being concluded, he the defender delivered up Anderson's security for the price, and received back the disposition which he the defender had granted in favour of Anderson, whereby the sale to Anderson was totally vacated, and the respondent reinstated in his original right to the tenement in question; therefore refuses the desire of this *ninth representation*, and adheres to the former interlocutors."

Thereafter David Loch made his appearance in the process; and the petitioner thereupon preferred his tenth representation; in which he prayed the Lord Ordinary to alter the former interlocutors, or at least to supersede any farther proceedings until the question betwixt Mr Loch and the respondent should be determined. But the Lord Ordinary, of this date, refused the representation, and adhered.

Nov. 23 1767.

The petitioner hath reclaimed; the petition is ordained to be seen and answered; and in obedience thereto, this is humbly offered on behalf of the respondent.

The petitioner, in the *first* place, contends, " That in all events procedure must be sisted, till the competition betwixt Mr Loch and the respondent be determined; because

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“ he says, that if it shall be found, that the tenement was
 “ the property of Anderson at his death, or that Mr Loch’s
 “ right is good, it must of course be found, that the peti-
 “ tioner has no right or title to the tenement, and therefore
 “ can convey none to Mr Chalmers, whatever claim might
 “ lie against the petitioner for damages.” And it is further
 said, “ That the petitioner had not come under an obliga-
 “ tion that he himself should grant a disposition to the re-
 “ spondent, but only that Anderson should grant it.”

But, with submission, the whole of this reasoning is most inconclusive; nor does the shadow of an argument from thence arise, why the interlocutor of the Lord Ordinary should be altered. The interlocutors complained of find, *That the petitioner is liable to grant to the respondent a valid disposition of the subjects in question.* And it is not easy to find upon what principle of law that judgement can be called in question, or that it can make the smallest variation upon it, whatever should be the effect of the dispute betwixt Mr Loch and the respondent.

It is quite immaterial in this question, whether, at the date of the obligation which the petitioner granted to the respondent, the right of the tenement was in the petitioner, or in Anderson. If the petitioner has come under an obligation, that Anderson should grant a valid right of the subject to the respondent, the petitioner is certainly bound to do every thing in his power to make that right effectual; and if Anderson should either refuse to dispoise, or had not the right, and therefore could not dispoise, there cannot be a doubt, that decret must pass against the person who granted the obligation, decerning him to grant a valid right to the subject.

If indeed the petitioner, who granted the obligation, had himself no right to the tenement, then the decret could not be specifically implemented by him, and the creditor in the obligation would be laid under the necessity of having re-

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course to a claim of damages, and which he behoved to liquidate the best way he could. But it is impossible that the debtor in the obligation can be allowed to say, that he is not bound to specific performance of the obligation ; but that the creditor must be contented with what damages he can qualify by the non-performance of the obligation. Without inquiring into what right is in the granter, the creditor is certainly intitled to have decreet against him for specific performance ; that by adjudging thereupon in implement, all and every right that is in the granter may be carried.

If the petitioner has truly no right, the respondent will of necessity be obliged to have recourse to a claim of damages ; but if the right is truly in the petitioner, and if he shall refuse to grant a voluntary disposition, the right can be carried by an adjudication in implement ; and the respondent is certainly well founded in the judgement already pronounced in his favour, in order to be the foundation of such adjudication.

The question betwixt Mr Loch and the respondent can afford no sort of defence to the petitioner. He cannot be allowed to plead his own turpitude, in having granted double rights, in defence against an obligation that was fairly and honestly obtained upon the part of the respondent. For altho' the petitioner had come under an obligation to dispoise the subject to twenty different persons, and although he could not give specific implement to more than one ; yet he would certainly be bound to give each of them specific implement ; and all and each of them would be intitled to have a personal decerniture against him, for that effect, that they might thereupon complete their titles by an adjudication in implement. In all such cases, he who should procure the first infestment, whether upon a voluntary disposition, or upon an adjudication in implement, would carry the subject, and the claims of the rest behoved of necessity to resolve into a claim of damages : so that the action at the instance of David Loch
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is so far from being a reason for a delay of the proceedings, that it is a reason why no delay should be granted, when the petitioner has no relevant defence against the action ; because by a delay he might otherwise be cut out of his preference, which he is in the course of establishing by diligence, and which he, like every other creditor, is intitled to establish upon the estate of his debtor.

At the same time, as shall be more particularly noticed in the answers to David Loch's petition, the respondent must observe, that there is not the smallest chance that David Loch can prevail in this case ; because it now clearly appears, that if ever the bargain with Anderson was completed, it was passed from ; that the disposition, upon the one hand, has been given up by Anderson to the petitioner, and the petitioner, on the other hand, hath given up the bill that Anderson had granted for the price ; and accordingly this bill is in the possession of Anderson's relict at this day.

The petitioner says, That no action can lie upon the obligation in question, because it was only a missive on one side without any counter obligation ; and that both parties must be bound, or neither ; as was determined in the cases, Mackenzie *contra* Park, and Stewart *contra* Bisset.

These cases are not as yet collected, and the respondent is not acquainted with the particular circumstances of them ; but, as he has been informed, they do by no means apply to the case in hand, because there the transaction was established by mutual writings ; and there can be no doubt, that if either of the writings be liable to a legal nullity, that the transaction cannot be binding.

But, in the present case, no objection or nullity does lie to the obligation in question ; and, with submission, there can be no doubt that a person may be effectually bound, by a monolateral deed, to dispoise lands, as well as to pay a sum of money. The acceptance of the obligation, upon the part of the creditor, does sufficiently bind him to perform the whole

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conditions under which the obligation is granted ; and in this case there can be no doubt of the acceptance of the obligation upon the part of the respondent, when the transaction has been so far carried into execution, that part of the price has been paid, and the respondent has entered into the possession, and has laid out his money in making repairs upon the subjects.

Neither is it a good answer to say, That where mutual writings are not granted, it is in the power of the person who is possessed of the writing, to defeat the right and interest of the other party, by destroying the deed. For although the person who wants to be secure against every risk, would take care to execute such a transaction, by granting mutual deeds ; yet it will afford no objection to the transaction, if habilely instructed, that it was executed in the form of a monolateral deed only. The law does not presume that any person will be guilty of so tortious an act, as to destroy a deed in which another person has an interest, without his consent ; and if any person should be guilty of so gross a fraud, and breach of trust, the law, upon a proof of the fact, would give full and ample redress. Indeed, if the argument proves any thing, it proves too much ; because, by the same rule, where such a transaction is executed in the form of a mutual contract, regularly signed by both parties ; yet it would not be binding upon either, unless two doubles had been executed : and yet it is believed that point has never hitherto been disputed.

But, *2do*, This point is not now entire, but is established by a judgement of the court, which has become final. For your Lordships will observe, that, in the process brought at the respondent's instance against the petitioner before the sheriff, for implement of the obligation, this very defence was pleaded among others. And the sheriff having overruled the defence, the petitioner complained by a bill of advocacy ; and the Lord Prestongrange Ordinary refused the

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bill; and your Lordships, upon advising petition and answer, of this date adhered.

Aug. 9. 1759.

The petitioner has made no answer to this plea of a *res judicata*; but it is said in the petition for Mr Loch, That an interlocutor given upon passing or refusing a bill of advocacy, is never considered as a proper final judgement upon the merits of the cause.

But although a judgement of the court, passing a bill of advocacy, is not considered as a final judgement upon the merits of the cause; yet it is impossible to doubt, that a judgement of the court, refusing a bill of advocacy, is as much a judgement upon the merits of the cause, as any that can be pronounced.

It is said, That when the second bill of advocacy was refused, it was expressed in the remit, that the petitioner should be heard as to all of his defences against granting the disposition; which the petitioner would consider as an alteration of the judgement that had been given upon the former bill of advocacy. But it is impossible that the interlocutor upon the second bill can bear any such construction. No more was or could be meant thereby, than that the petitioner should be heard upon every relevant defence he had against the action; but certainly it could never be meant thereby, that he could be heard upon an objection that had been already proponed and repelled by a final judgement of the court.

The petitioner says, in the *last* place, That he cannot be bound to implement, as the respondent himself failed to implement the bargain upon his part; for that he neither made a tender of the money at Martinmas 1757, nor presented a disposition to Anderson, to be signed by him.

In the *first* place, Supposing the fact true, yet such failure could not have the effect of annulling or irritating the bargain. The respondent would still be allowed to implement, upon making up any damages that could be qualified by the

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mora upon his part, unless a declarator had been obtained, annulling the bargain on account of non-implement.

But, *2do*, In point of fact, the respondent was always willing to implement in terms of the missive. At Martinmas 1757, he offered payment to the petitioner of the L. 100 Sterling, in terms of the missive; although he only accepted of L. 50 of it, in respect, as he said, he had no occasion for more money at that time.

And as to his demanding a disposition from Anderson, it could not hurt the respondent, although he had never required Anderson to grant it. The respondent had no title to make any claim against Anderson, with whom he had never contracted. It was the petitioner's duty, in terms of his obligation, to have procured the right from Anderson, and to have delivered it to the respondent.

The respondent, therefore, with submission, hopes, that your Lordships can have no difficulty to refuse the petition, and to adhere to the many interlocutors that have been pronounced in this cause by the present Lord Ordinary and his predecessor.

The petitioner is found liable by the Lord Ordinary in the expences of process; and the respondent is humbly persuaded, that your Lordships will be of opinion, upon the above detail of the facts and proceedings, that if ever, in any case, a party had, by his conduct, subjected himself to the full expences of process, it is in the present. The cause, though liable to no sort of ambiguity, has, by uncommon arts used by this petitioner, and by a train of the most litigious and vexatious conduct, been kept in dependence for about nine years; and the petitioner, by turning himself into all the different shapes that his invention could suggest, has obliged the respondent to lay out above one half of the value of the subject in dispute in expences at law.

Your Lordships will observe from the proceedings above deduced, that during the dependence of the action before the sheriff, no less than eight interlocutors were pronounced, ordaining

ordaining the petitioner to grant the disposition, viz. 2d and 30th May, 15th June, 18th July, 15th and 31st August 1759, and 9th and 25th July 1760. And there has been already pronounced by the court of session, no less than fourteen different interlocutors in favour of the respondent, viz. one by Lord Prestongrange, upon the 29th July 1759, and adhered to by your Lordships, 9th August thereafter; and one by Lord Edgefield, upon the 18th October 1759; and by the late Lord Justice-Clerk, one upon the 12th July 1760, 8th January, and 15th December 1761, and 17th February, and 4th March 1766, and by the present Lord Ordinary, no less than six different interlocutors.

However plain and simple the bargain was, the respondent has not only been obliged to raise an action against the petitioner for implement, and in which he has obtained so many judgements in his favour; but the petitioner has, by an ingenuity peculiar to himself, split the cause into a number of branches; so that the respondent has been obliged to defend himself in four processes before the court of session, viz. three advocations, and one reduction; and to defend his tenant Mr Hay in three processes before the bailies of the Canongate, and two before the court of session, viz. the fore-said suspension, and multiple-pointhing; as also to defend Walter Neilson in a process before the court of session, and to support the claim made before the sheriff by Mr Ker, for searching the records for incumbrances affecting the subjects, in all eleven processes besides two submissions which he would never meet upon, and the trouble of numberless communnings which he would never abide by.

By these means the respondent has not only been put to above one half of the value of the subject in law-expences, but also suffered a very great loss by so long a delay to implement the bargain, as he could have meliorated the subjects very considerably: for all which the respondent has no doubt, that your Lordships justice will give ample redress.

In respect whereof, &c.

11 JULY 62

RO. MACQUEEN.